

**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

EDUARDO TAPIA,	:	
	:	Civil Action No. 12-4725 (FLW)
Petitioner,	:	
	:	
v.	:	<b>OPINION</b>
	:	
BEVERLY HASTINGS, et al.,	:	
	:	
Respondents.	:	

**APPEARANCES:**

Petitioner pro se  
Eduardo Tapia  
East Jersey State Prison  
Rahway, NJ 07065

**WOLFSON**, District Judge

Petitioner Eduardo Tapia, a prisoner currently confined at East Jersey State Prison in Rahway, New Jersey, has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254<sup>1</sup> challenging his conviction for kidnapping. The

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<sup>1</sup> Section 2254 provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Respondents are Beverly Hastings and the Attorney General of the State of New Jersey.

By Opinion and Order [5, 6] entered September 4, 2012, Petitioner was directed to show cause why this Petition should not be dismissed with prejudice as untimely. Petitioner has filed his Response [10] and this matter is now ready for decision.

#### I. BACKGROUND

Following a jury trial in the Superior Court of New Jersey, Law Division, Monmouth County, Petitioner was convicted in 2003 of second-degree conspiracy to commit kidnapping, in violation of N.J.S.A. 2C:5-2 and N.J.S.A. 2C:13-1, first-degree kidnapping, in violation of N.J.S.A. 2C:13-1(b), third-degree possession of a weapon (switchblade) for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(d), and fourth-degree possession of a prohibited weapon (switchblade), in violation of N.J.S.A. 2C:39-3(e).

The trial court sentenced Petitioner to an aggregate sentence of sixteen years subject to an 85% parole disqualifier pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

On direct appeal, the Superior Court of New Jersey, Appellate Division, affirmed the conviction and sentence.<sup>2</sup> The

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<sup>2</sup> On direct appeal, Petitioner asserted the following grounds for relief: (1) ineffective assistance of trial counsel, (2) insufficient evidence to sustain the convictions, (3) excessive sentence.

Supreme Court of New Jersey denied certification on October 7, 2005. State v. Tapia, 185 N.J. 295 (2005). Petitioner did not seek a writ of certiorari from the Supreme Court of the United States.

Petitioner filed his first state petition for post-conviction relief on January 6, 2006. In an oral opinion placed on the record on January 26, 2007, the trial court denied relief. The Appellate Division affirmed the denial of relief, State v. Tapia, 2009 WL 112726 (N.J. Super. App.Div. Jan. 20, 2009), and on May 8, 2009, the Supreme Court of New Jersey denied certification. State v. Tapia, 199 N.J. 516 (2009).<sup>3</sup>

Petitioner filed his second state petition for post-conviction relief on June 15, 2009.<sup>4</sup> The trial court found the second PCR petition time barred, pursuant to the five-year limit of Rule 3:22-12 of the New Jersey Court Rules, procedurally barred, pursuant to Rules 3:22-4 and 3:22-5, and meritless. The Appellate Division affirmed on the same grounds.

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<sup>3</sup> In his first state PCR petition, Petitioner raised and exhausted claims related to the ineffective assistance of trial and appellate counsel, including the failure to object to an allegedly improper summation by the prosecutor. Certain claims raised for the first time on appeal were not considered by the Appellate Division.

<sup>4</sup> In his second state PCR petition, Petitioner raised claims of ineffective assistance of trial and appellate counsel, including the failure to request a hearing regarding the admissibility of his statements under Miranda v. Arizona, 384 U.S. 436 (1966), the failure to investigate and call witnesses, and the failure to object to jury instructions.

Post-conviction relief constitutes "New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). ...

To protect against courts addressing endless issues in a piecemeal fashion, certain procedural rules govern PCR petition filings. For example, Rule 3:22-12(a) imposes a five-year limitation on filing a petition after the judgment sought to be attacked. Although the time limitations are not absolute and may be waived to prevent a fundamental injustice, the rule must be viewed in light of its dual purpose to ensure that the passage of time does not prejudice the State's retrial of a defendant and to respect the need for achieving finality. State v. DiFrisco, 187 N.J. 156, 166-67 (2006). ...

We are satisfied that defendant's PCR petition, filed six years after the judgment of conviction without any claim of excusable neglect, is clearly time-barred. R. 3:22-12.

State v. Tapia, 2012 WL 163125, \*3 (N.J. Super. App.Div. Jan. 20, 2012). The Supreme Court of New Jersey denied certification on June 21, 2012. State v. Tapia, 210 N.J. 480 (2012).

This Petition, dated July 5, 2012, followed.<sup>5</sup> Here, Petitioner asserts that he was denied his constitutional right to effective assistance of counsel because his trial counsel failed to request a Miranda hearing to test the voluntariness of Petitioner's statements and failed to call any witnesses.

## II. ANALYSIS

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<sup>5</sup> "[A] pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court." Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998) (citing Houston v. Lack, 487 U.S. 266 (1988)).

The limitation period for a § 2254 habeas petition is set forth in 28 U.S.C. § 2244(d),<sup>6</sup> which provides in pertinent part:

(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

Here, Petitioner alleges no facts suggesting a later starting date than the date that the challenged judgment became

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<sup>6</sup> The limitations period is applied on a claim-by-claim basis. See Fielder v. Verner, 379 F.3d 113 (3d Cir. 2004), cert. denied, 543 U.S. 1067 (2005); Sweger v. Chesney, 294 F.3d 506 (3d Cir. 2002).

final, under 28 U.S.C. § 2244(d)(1)(A).<sup>7</sup> Thus, evaluation of the timeliness of this § 2254 petition requires determination of, first, when the pertinent judgment became "final," and, second, the period of time during which any application for state post-conviction relief was "properly filed" and "pending."

A state-court criminal judgment becomes "final" within the meaning of § 2244(d)(1) by the conclusion of direct review or by the expiration of time for seeking such review, including the 90-day period for filing a petition for writ of certiorari in the United States Supreme Court. See Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000); Morris v. Horn, 187 F.3d 333, 337 n.1 (3d Cir. 1999); U.S. Sup. Ct. R. 13.

Here, the challenged judgment became "final," and the federal habeas limitations period began to run, on January 3, 2006, ninety days after the Supreme Court of New Jersey denied certification in Petitioner's direct appeals, on October 5, 2005. Thus, Petitioner had until January 3, 2007, to file his federal habeas petition, unless there were grounds for tolling.

To statutorily toll the limitations period, a state petition for post-conviction relief must be "properly filed."

An application is "filed," as that term is commonly understood, when it is delivered to, and

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<sup>7</sup> That is, Petitioner does not allege that he was under any impediment, or that he relies upon a new and retroactive rule of constitutional law, or that the factual predicates for his claims were not known to him at the time the conviction became "final."

accepted by the appropriate court officer for placement into the official record. And an application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. In some jurisdictions the filing requirements also include, for example, preconditions imposed on particular abusive filers, or on all filers generally. But in common usage, the question whether an application has been "properly filed" is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar.

Artuz v. Bennett, 531 U.S. 4, 8-9 (2000) (citations and footnote omitted) (finding that a petition was not "[im]properly filed" merely because it presented claims that were procedurally barred under New York law on the grounds that they were previously determined on the merits upon an appeal from the judgment of conviction or that they could have been raised on direct appeal but were not).

Where a state court has rejected a petition for post-conviction relief as untimely, however, it was not "properly filed" and the petitioner is not entitled to statutory tolling under § 2244(d)(2). Pace v. Diguglielmo, 544 U.S. 408 (2005). This is so even where, in the alternative, the state court addresses the merits of the petition in addition to finding it untimely. Carey v. Saffold, 536 U.S. 214, 225-26 (2002).

An application for state post-conviction relief is considered "pending" within the meaning of § 2244(d)(2), and the

limitations period is statutorily tolled from the time it is "properly filed," during the period between a lower state court's decision and the filing of a notice of appeal to a higher court, Carey v. Saffold, 536 U.S. 214 (2002), and through the time in which an appeal could be filed, even if the appeal is never filed, Swartz v. Meyers, 204 F.3d at 420-24. More specifically, "The time that an application for state post conviction review is 'pending' includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, provided that the filing of the notice of appeal is timely under state law." Evans v. Chavis, 546 U.S. 189, 191 (2006) (finding that time between denial of post-conviction relief and filing of appeal was not tolled where appeal was untimely, even where state considered untimely appeal on its merits). However, "the time during which a state prisoner may file a petition for writ of certiorari in the United States Supreme Court from the denial of his state post-conviction petition does not toll the one year statute of limitations under 28 U.S.C. § 2244(d)(2)." Stokes v. District Attorney of the County of Philadelphia, 247 F.3d 539, 542 (3d Cir.), cert. denied, 534 U.S. 959 (2001).

Here, Petitioner filed his first state petition for post-conviction relief three days after the conviction became "final" for federal habeas purposes. That first PCR petition remained



pending until the Supreme Court of New Jersey denied certification on May 8, 2009. At that point, Petitioner had 362 days remaining on his federal limitations period, or until May 5, 2010, unless there were grounds for additional tolling.

Petitioner filed his second state PCR petition on June 15, 2009. Such filing, however, did not toll the statute of limitations for the purposes of Plaintiff's federal habeas petition, because the state courts determined that the PCR petition was time-barred under state law. In that regard, the finding that the second state PCR petition was untimely filed disqualifies that petition as "properly filed." See Heleva v. Brooks, 581 F.3d 187, 194 (3d Cir. 2009). Accordingly, because the PCR petition does not satisfy the conditions for statutory tolling under § 2244(d)(2), the instant federal habeas Petition had to be filed by May 5, 2010.

While Petitioner does not dispute any of the foregoing dates or findings, he, nevertheless, contends that the limitations period should be equitably tolled. Petitioner's sole reason is based upon the fact that he had no prior knowledge of the requirement that state petitions for post-conviction relief must be "properly filed" in order to statutorily toll the limitations period and that, if he had known of that requirement, he would have asserted "excusable neglect" in state court to justify the late filing of his second state petitioner for post-conviction

relief, or he would not have proceeded with the second state PCR petition.

Addressing Plaintiff's "excusable neglect" argument, as noted in this Court's prior Opinion, the limitations period of § 2244(d) is indeed subject to equitable tolling. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir.), cert. denied, 534 U.S. 944 (2001); Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999); Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). However, equitable tolling applies

only when the principles of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims. Mere excusable neglect is not sufficient.

Miller, 145 F.3d at 618-19 (citations and punctuation marks omitted). Among other circumstances, which are not relevant here, the Court of Appeals for the Third Circuit has held that equitable tolling may be appropriate "if the plaintiff has timely asserted his rights mistakenly in the wrong forum," i.e., if a petitioner has filed a timely but unexhausted federal habeas petition. Jones, 195 F.3d at 159. See also Duncan v. Walker, 533 U.S. 167, 183 (2001) (Stevens, J., joined by Souter, J., concurring in part) ("neither the Court's narrow holding [that the limitations period is not statutorily tolled during the pendency of a premature federal habeas petition], nor anything in

the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity"); 533 U.S. at 192 (Breyer, J., dissenting, joined by Ginsburg, J.) (characterizing Justice Stevens's suggestion as "sound"). None of these circumstances are present in this case.

Here, Petitioner's assertion of ignorance regarding the requirements of the federal limitations period is not a sufficient basis for equitable tolling. Indeed, ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing. Fisher v. Johnson, 174 F.3d 710, 714 (5th Cir. 1999), cert. denied, 531 U.S. 1164 (2001); Delaney v. Matesanz, 264 F.3d 7, 15 (1st Cir. 2001). Petitioner simply fails to demonstrate any extraordinary circumstances that would permit the equitable tolling of the one-year statute of limitations. Consequently, his habeas petition - filed more than two years after the federal limitations period expired on May 5, 2010 - is dismissed with prejudice as time-barred.

### III. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Here, jurists of reason would not find debatable this Court's procedural ruling regarding the untimeliness of this Petition. Accordingly, no certificate of appealability will issue.

IV. CONCLUSION

For the reasons set forth above, the Petition will be dismissed with prejudice as untimely. No certificate of appealability will issue. An appropriate order follows.

/s/ Freda L. Wolfson  
Freda L. Wolfson  
United States District Judge

Dated: October 3, 2012